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IN THE

Supreme Court of the United States

October Term, 1963

No. _____

THE AMERICAN TOBACCO COMPANY,

Petitioner,

-v-

MARY GREEN,

Respondent.

THE AMERICAN TOBACCO COMPANY,

Petitioner,

-v-

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Citation to Opinions Below

The first opinion of the Court of Appeals, affirming the judgment of the District Court, Judge Cameron dis-

senting, is reported at 304 F.2d 70; the Court's order on re-hearing to certify the question of Florida law to the Supreme Court of Florida is reported at 304 F.2d 85; the answer of the Supreme Court of Florida to the certified question is reported at 154 So.2d 169; the opinion of the Court of Appeals reversing the District Court and ordering a partial new trial (Judge Cameron dissenting on the ground that liability of defendant was established) is reported at 325 F.2d 673. These opinions are in the Appendices of the Petition.

Questions Presented

The petitioner's statement of the question presented is factually incorrect. The parties' new trial granted is not on the total issue of liability but merely on whether the defendant's cigarettes were reasonably fit and wholesome to the general public.

Question Presented as Restated by Respondent

When, in an action for breach of implied warranty of the wholesomeness of cigarettes, the Court of Appeals conceives that a judgment for liability requires a specific finding of a jury that the cigarettes were not reasonably fit and wholesome to the public generally, is such issue sufficiently distinct and separate from the issues specifically found by a previous jury by interrogatories, i.e., that decedent contracted lung cancer and died as a result of smoking defendant's cigarettes, so that a fair trial may be held on the single remaining issue?

Statement of the Case

Edwin M. Green sued American Tobacco Company in December 1957, in the United States District Court for the Southern District of Florida for breach of implied warranty causing lung cancer as a result of smoking defendant's product, Lucky Strike cigarettes. After Mr. Green's death on February 25, 1958, the case was continued by his Administrator. Decedent's widow filed suit under the Florida wrongful death statute. Both actions were consolidated. All theories of liability originally alleged, including negligence, are now immaterial except for implied warranty. The trial court submitted to the jury the following interrogatories:

"(1) Did the decedent Green have primary cancer in his left lung? Yes."

"(2) Was the cancer in his left lung the cause or one of the causes of his death? Yes."

"(3) Was the smoking of Lucky Strike cigarettes on the part of the decedent Green a proximate cause or one of the proximate causes of the development of cancer in his left lung? Yes."

"(4) Could the defendant, on or prior to February 1, 1956, by the reasonable application of human skill and foresight, have known the users of Lucky Strike cigarettes, such as the decedent Green, would be endangered, by the inhalation of the main stream smoke from Lucky Strike cigarettes, of contracting cancer of the lung? No."

The jury answered the first three interrogatories in

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the affirmative and the fourth in the negative. The District Court's charge to the jury required the general verdict to be for the defendant unless the jury could answer the fourth interrogatory in the affirmative. The Court of Appeals, 5th Circuit, first thinking that the charge correctly stated the law of Florida, affirmed the judgment by a divided court,[1] but upon rehearing certified to the Supreme Court of Florida the following question:

> "Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, when the defendant manufacturer and distributor could not, on or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered, by the inhalation of the mainstream smoke from such cigarettes, of contracting cancer of the lung?" Answer: Yes

The Supreme Court of Florida answered the question in the affirmative:

> "Upon the critical point, our decisions conclusively establish the principle that a manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty, and the question

[1] The late Judge Cameron dissenting.

certified must therefore be answered in the affirmative." 154 So.2d 169.

This answer of the Florida Supreme Court required a reversal, but the question still remained as to the scope of a new trial. The plaintiffs argued that in view of Florida law the answers to interrogatories 1, 2 and 3 left no issue of fact on liability to be decided.[2] The defendant argued for a complete new trial. The Court of Appeals[3] accepted neither argument and decided that although there was proof that the incidence of lung cancer among cigarette smokers was twenty times higher than among non-smokers, in the absence of a specific finding by a jury that the defendant's cigarettes were not reasonably fit and proper for human consumption as to the public generally, the case should be retried by a second jury to determine that question. The Court held that it was possible that the same cigarettes which caused Green to die from lung cancer might also be found "*reasonably* fit and wholesome" for human consumption, and the two findings be consistent

[2] This contention was made in the District Court by plaintiffs' post trial motion for judgment under Rule 49(b) [R. 1149-1158]; and was asserted on appeal as plaintiffs-appellants' first question (see first opinion of Court of Appeals, 304 F.2d at 72). As petitioner concedes (footnote, p. 14 of Petition), Rule 49(b) does provide that where the jury's answers are consistent with each other, but inconsistent with the general verdict, judgment may be entered in accordance with the answers, but may not be entered in accordance with the general verdict. In such circumstances the specific answers of the jury are deemed a more accurate determination than the general verdict. These are precisely the circumstances plaintiffs submit are present in this case under the Florida Supreme Court's advisory opinion — i.e., the jury's answers are consistent with each other, but are inconsistent with the general verdict. See plaintiffs' cross petition for certiorari in this case.

[3] Judge Cameron dissenting on the basis of his consistent position that plaintiffs had established liability by the jury's special answers to the jury interrogatories.

with each other. Obviously the only way this is conceivable would be for the jury to find the cigarettes reasonably fit and wholesome for the public generally, albeit unwholesome and lethal for Green.

Reasons Why Writ Should Be Denied

While petitioners conceive that the issue ordered to be tried by the Court of Appeals is not required by the law of Florida and that they have already established liability, the question on this petition concerns the power of a court of appeals to grant a partial new trial.

Constitutionality of a Partial New Trial

That a partial new trial does not offend the Seventh Amendment was put at rest in **Gasoline Products Co., Inc. v. Champlin Refining Co.** (1931), 283 U.S. 494:

> "It [the Seventh Amendment] does not prohibit the introduction of new methods for ascertaining what facts are in issue, see Ex parte Peterson, 253 U.S. 300, 309, 64 L. Ed. 919, 923, 40 S. Ct. 543, or require that an issue once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury." Id. at 498.

Since the adoption of the Federal Rules of Civil Procedure, the contention that a partial new trial offends the Seventh Amendment was rejected in **Thompson v. Camp**, 6th Cir., 167 F.2d 733. The argument that the Seventh

Amendment requires one jury to decide all issues at one trial is an argument that the forms of the common law jury trials rather than its substance is guaranteed. This contention was examined and expressly rejected by this Court in stating its holding in the **Gasoline Products Co.** case:

> "Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again." 283 U.S. at 499.

Even the more substantive proposition that the Seventh Amendment prohibits a directed verdict was rejected in **Galloway v. United States** (1943), 319 U.S. 372, although with strong dissent. And in **Norfolk S. R. Co. v. Ferebee** (1915), 238 U.S. 269, this Court in a Federal Employers Liability Act case unanimously approved the application of some but not all of a jury's special findings to a partial new trial on the ground that the issues in the partial new trial were separable from those held to have been conclusively determined in the first trial — a ruling comparable in all respects to what petitioner calls the "unprecedented" ruling in this case.

Procedural Irregularity

Partial new trials are specifically provided for in Rule 59(a), Federal Rules of Civil Procedure:

> "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in

an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; * * * "

The propriety, as well as the constitutionality of a partial new trial was passed on in **Gasoline Products Co. v. Champlin Refining Co., supra.** Whether a partial new trial should be granted depends upon whether the issue to be retried is "so distinct and separable from the others that a trial of it alone may be had without injustice." Id. at 500. By that standard "the issues arising upon petitioner's cause of action on the royalty contract are clearly separable from all others and the verdict as to them already given is free from error, it need not be disturbed." Id. at 499. But since the question of damages on the counterclaim was "so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." Id. at 500, a new trial on all issues raised by the counterclaim was ordered.[4]

Applying the same standard to cases decided since the adoption of the Federal Rules of Civil Procedure, see **Ecker v. Potts**, D.C. Cir., 112 F.2d 581; and **Devine v. Patteson**, 6th Cir., 242 F.2d 828, cert. den., 355 U.S. 821.

In the case last cited, the district judge was reversed for failing to grant a *limited* new trial, the Court of Appeals saying:

[4] The issues there held interwoven concerned the counterclaim only, and these were interwoven only because uncertainties as to dates and terms of the *oral* contract counter-claimed upon made separation of issues virtually impossible — a situation not comparable to the instant case.

> "A majority of the court thinks it would be unjust to the plaintiff who has proved to the satisfaction of the jury that he was subjected to malicious persecution to have to retry the question, not only of damages, but also of liability. If the issues are as we think, separate and distinct, conceivably plaintiff might be compelled to pay a second very large amount for legal expenses in order to collect the amounts expended in the first suit." 242 F.2d at 832-833.

Barron and Holtzoff, in their **Federal Practice and Procedure**, § 1307, commenting on Rule 59 say:

> "If issues are framed for the jury and the issue as to which a new trial is required is separate from all other issues, and the error requiring a new trial does not affect the determination of any other issue, the scope of the new trial may be limited to the single issue."

The question whether the issue ordered for a new trial is so distinct and separate from those already tried and decided that it may in fairness be so tried, is one which must be left largely within the discretion of the lower federal courts so ordering because of their familiarity with those issues. This Court certainly can not undertake to review each case and record to decide when a partial new trial is appropriate and on which issues. But even the most cursory examination of the issues in this case shows that no issue could be more distinct than the one here under consideration.

What has already been decided by jury findings is

that Green died of lung cancer proximately caused by smoking defendant's cigarettes. This concerns the conduct of Green and the consequences to Green. That the defendant's cigarettes were unfit and unwholesome as to Green, since they killed him, has already been established. The Court of Appeals holds that this is not enough,—that Green's representatives must also prove that the defendant's cigarettes are dangerous to the public generally. This is the same question covered by the recent report of the Advisory Committee to the Surgeon General of the Public Health Service.* To have a fair trial on this issue does not require that it be proved again that, (1) Green had primary cancer in his left lung; or (2) that Green died from the cancer in his left lung; or that (3) the cancer in Green's left lung was proximately caused by the smoking of Lucky Strike cigarettes. The issue of whether other people—not Green—were endangered by use of defendant's product of contracting lung cancer, vel non, is certainly a separate and distinct issue from Green's risk, already proven after a long and expensive trial.

Petitioner cites **Magenau v. Aetna Freight Lines, Inc.** (1959), 360 U.S. 273. This case repudiates petitioner's contentions. There was no intimation that a partial new trial offended either the Seventh Amendment or Rule 59, notwithstanding that all questions of liability were determined by a jury on interrogatories. A complete new trial was there directed solely because "a limited hearing would not be in the interest of fairness and efficiency in judicial administration." Id. at 279.

Neither does **Hiltz v. Atlantic Refining Co.**, 3rd Cir., 151 F.2d 159, support the petition. It was explicitly as-

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sumed that a partial new trial was proper procedure if the issues were distinct, which they were not in that case.

The reference by petitioner to the allegations of the complaint is a pure irrelevancy. All theories of liability other than implied warranty have been excluded from this case since the appeal began. The Florida law as to whether knowledge of the defendant is relevant to implied warranty was settled by the question certified to the Florida Supreme Court and its answer.

Argument that a jury's answers to interrogatories are not res judicata is beside the point. This case will not be res judicata until it is finally decided, a state of affairs which the respondents have not yet despaired of. The trial of the case has not yet been completed. It is just possible that this may be accomplished before Green's widow dies of old age if plaintiffs are allowed the privilege of completing the trial begun over six years ago without further delay or error induced by the American Tobacco Company.

Were the question now for consideration the abolition of Rule 49 as a matter of judicial administration, we candidly say we would speak for the affirmative, for it is respondents' counsel's view that generally it denigrates the jury function and provides a useful tool for the economically powerful litigants to win legal battles by attrition.

[1] Petitioner sought an extension of time for filing the instant petition due in part to the fact that two of petitioner's counsel have passed away since this litigation began in 1957, both deaths occurring prior to the recent demise of Judge Cameron who sat in this case. In only 2 or 3 more years decedent's 9-year-old daughter will be leaving home for college or a job.

[2] In this case the jury was required to answer each jury interrogatory in the affirmative before proceeding to the next. (R. 1139). Four

On such a question we would not expect to be allied with counsel for the American Tobacco Company. In this particular case, however, Rule 49 has operated to save a widow and her son, as administrator for his father's estate, an enormous expense in retrial. Such operation of the Rule to conserve judicial effort and to reduce the tremendous (if not prohibitive) cost of litigation, should not be discouraged. Actually, plaintiffs believe that they have proved already to a jury everything which Florida law ever required them to prove to be entitled to a judgment of liability. But at least they have proven everything except that the defendant's cigarettes are not reasonably fit and wholesome vis-a-vis the general public. Neither Justice nor the Seventh Amendment requires a complete new trial at a price only wealthy litigants can afford in order merely to determine this single remaining issue.

affirmative "hurdles" had to be leaped in succession to reach a verdict of liability — while one negative answer, at any point, resulted under the Court's charge in a general verdict of no liability. The pragmatic burden of proof under such circumstances is heavier indeed than a mere "preponderance".

Conclusion

The issue ordered to be tried before a second jury—that cigarettes are not reasonably fit and wholesome for human consumption by the general public—is quite distinct and separate from the issues heretofore tried and decided by jury findings, and therefore a fair trial of it alone may be held. The petition of the American Tobacco Company for a writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was served by mail this 2 day of April, 1964, upon Edward R. Neaher, Janet C. Brown and Edward C. McLean, Jr., all of Chadbourne, Parke, Whiteside & Wolff, 25 Broadway, New York 4, New York, Counsel for Petitioner, and upon Hervey Yancey, of Smathers & Thompson, Alfred I. duPont Building, Miami, Florida, counsel for Petitioner, by depositing the same in the United States mail addressed to said counsel as aforesaid with sufficient air mail postage, prepaid.

NEAL RUTLEDGE

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